Supreme Court, U.S.
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No. 05-311

In The Supreme Court of the United States

KATHLEEN PARDUE,

Petitioner,

v.

THE CENTER CITY CONSORTIUM SCHOOLS OF THE ARCHDIOCESE OF WASHINGTON, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

David H. Martin, Esq.
Counsel of Record
EMPLOYMENT LAW GROUP
888 17th Street, NW
Suite 900
Washington, DC 20006
(202) 261-2806

Counsel for Petitioner

THE LEX GROUP DC • 1750 K Street, NW • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTION PRESENTED

Whether and to what extent the First Amendment of the United States Constitution exempts religious institutions from accountability from all claims of discrimination, regardless of their basis, proscribed by valid and neutral State and Federal employment antidiscrimination laws?

PARTIES TO THE PROCEEDING

Petitioner is Kathleen Pardue, who was plaintiff in the Superior Court of the District of Columbia and appellant in the District of Columbia Court of Appeals. Respondents are the Center City Consortium of Schools of the Archdiocese of Washington, Inc. ("Center City Consortium of Schools") and Mary Anne Stanton, defendants in the Superior Court of the District of Columbia and appellees in the District of Columbia Court of Appeals.

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The June 9, 2005, opinion of the District of Columbia Court of Appeals is annexed hereto and reported at *Pardue v. Center City Consortium Schools of Archdiocese of Washington, Inc.*, 875 A.2d 669 (D.C. 2005). App. 1a. The court of appeals affirmed the decision of the Superior Court of the District of Columbia entered on July 29, 2003, in which it dismissed Petitioner's District of Columbia Human Rights Act claim for lack of subject matter jurisdiction. App. 25a. The superior court subsequently entered an order granting summary judgment on the remaining counts of Petitioner's complaint on October 29, 2003. App. 19a. It then dismissed the remaining counts in Petitioner's complaint on October 29, 2003. App. 24a.

JURISDICTION

The District of Columbia Court of Appeals, which is the Court of last resort in the District of Columbia, issued its decision and final judgment on June 9, 2005. App. 1a. This petition is timely filed within ninety days following the District of Columbia Court of Appeals' decision, published at 875 A.2d 669. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257 and Rule 10(c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

D.C. Code Ann. § 2-1402.11(a)(1): "(a) General. -- It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, genetic information, disability, matriculation, or political affiliation of any individual: (1) By an employer. -- To fail or refuse to hire, or to discharge, any individual; or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, including promotion; or to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his status as an employee."

D.C. Code Ann. § 2-1401.03(b): "Nothing in this chapter shall be construed to bar any religious or political organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious or political organization, from limiting employment, or admission to or giving preference to persons of the same religion or political persuasion as is calculated by the organization to promote the religious or political principles for which it is established or maintained."

42 U.S.C. § 2000e-2(a)(1): "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-1(a), provides: "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

STATEMENT OF THE CASE

This petition presents a question that divides federal and state courts and is critical to the enforcement of State and Federal employment anti-discrimination laws: whether and to what extent the First Amendment exempts religious institutions from accountability for all claims of discrimination, regardless of their basis, proscribed by valid and neutral employment antidiscrimination laws?

When faced with this question in the case below the District of Columbia Court of Appeals declared for the first time in the history of the DCHRA that the "ministerial exception" was a bar to suits alleging any form of discrimination under the District of Columbia's

Human Rights Act, D.C. Code Ann. § 2-1401.01, *et seq.* (DCHRA), a valid and neutral statute that proscribes, *inter alia*, racial discrimination in the employment setting.[1] App. 7a. The DCHRA already possesses in D.C. Code Ann. § 2-1401.03(b) a narrow carve-out exempting religious institutions from claims of religious discrimination in the workplace, yet the court of appeals expanded on this exemption by adopting the ministerial exception, an exception that provides protections from liability that are far in excess of the parameters contemplated by the drafters of the statute. Hence, instead of limiting a religious institution's liability to claims deriving out of religious discrimination, the court of appeals has effectively exempted religious institutions from accountability from all claims of discrimination proscribed by valid and neutral State and Federal employment antidiscrimination laws.

A. Background

From July 1996 until January 2002, Petitioner served as principal of Respondent Center City Consortium of Schools of the Archdiocese of Washington, Inc.'s St. Francis Xavier Catholic School. App. 2a., 25a. Petitioner is a Caucasian Catholic, App. 3a., and Petitioner's job duties as principal of St. Francis predominantly consisted of the administrative

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[1] In proclaiming as new law that the "ministerial exception" is a jurisdictional bar to suits alleging any form of discrimination under the DCHRA, the court of appeals created the issue on appeal. *See, e.g., Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993) (subject matter jurisdiction may be challenged at any time by the parties, the court *sua sponte*, and even on appeal).

responsibilities involved with the school's management and budget operations. App. 13a, 14a. Petitioner's employment continued from year to year without incident until 2001 when Respondent Center City Consortium of Schools hired Respondent Stanton as its Executive Director.

In January 2002, Respondent Stanton forced Petitioner to resign her employment with Respondent Center City Consortium of Schools because Respondent Stanton wanted the principal of her predominantly African-American school to look more like the students. App. 2a, 3a. Soon after Petitioner's forced resignation, Respondents hired as the new principal of St. Francis a non-Catholic, African-American male who possessed limited experience in education and had expired teaching credentials. App. 2a, 3a.

B. District of Columbia Superior Court Proceedings

Petitioner filed suit against Respondents in the Superior Court for the District of Columbia alleging in her central claim that the Respondents violated the DCHRA, which prohibits employers from making employment decisions motivated by race. App. 25a-26a. Respondents filed a motion to dismiss the lawsuit principally on the ground that the Free Exercise and Establishment Clauses of the First Amendment deprived the court of subject matter jurisdiction over her claims. App. 26a. On July 29, 2003, the superior court partially granted the Respondent's motion and dismissed Petitioner's claims under the DCHRA on the

ground that Petitioner's principal position fell within the ministerial exception, thus depriving the court of subject matter jurisdiction. App. 38a. The superior court dismissed Petitioner's remaining counts on October 24, 2003. App. 24a.

C. District of Columbia Court of Appeals Proceedings

Petitioner appealed the dismissal of her complaint to the District of Columbia Court of Appeals. On June 9, 2005, the court of appeals noted that, "[n]o one disputes that, as a matter of statutory interpretation, the DCHRA would prohibit termination from employment on the grounds [race discrimination] alleged by [Petitioner]." App. 7a n. 3. Nevertheless, the court of appeals held that the superior court correctly determined that Petitioner's claims under the DCHRA were barred for lack of subject matter jurisdiction. App. 10a. The court of appeals explained its holding by noting that governmental non-interference with a religious institution's employment practices takes precedence over the government's interest in eliminating racial discrimination in the workplace:

> We hold that the ministerial exception as applied in the case of federal statutes may be raised as a bar to suits alleging discrimination under the DCHRA. Although "[i]t would... be difficult to exaggerate the magnitude of [the District's] interest in assuring equal employment opportunities for all,

> regardless of race, sex, or national origin," (citation omitted), abundant decisional law from this court and others confirms "the constitutional imperative of governmental non-interference with the ministerial employment decisions of churches." (Citation omitted.)

App. 7a.

REASONS FOR GRANTING THE WRIT

I. OVERVIEW.

According to the District of Columbia Circuit, the common law created ministerial exception holds that "the Free Exercise Clause exempts the selection of clergy from Title VII and similar statutes and, as a consequence, precludes civil courts from adjudicating employment discrimination suits by ministers against the church or religious institution employing them." *EEOC v. Catholic Univ. of Am.*, 317 U.S. App. D.C. 343, 349, 83 F.3d 455, 461 (1996).[2] The ministerial exception to Title VII was first articulated in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), and it does not depend upon ordination but rather upon the function of the position. *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1168 (4th Cir. 1985). However, it is key to observe that the *McClure* Court also declared that, "[t]he language and the legislative

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[2] The employee, however, need not be an actual minister in order for the Court to be deprived of subject matter jurisdiction. *See Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment. *McClure*, 460 F.2d at 558. The *McClure* Court then considered the issue of whether "the application of the provisions of Title VII to the relationship between The Salvation Army and Mrs. McClure (a church and its minister) violate either of the Religion Clauses of the First Amendment?" *McClure*, 460 F.2d at 558. In its decision predating this Court's opinion in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 882 (1990), the Fifth Circuit then declared, "[w]e find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment." *McClure*, 460 F.2d at 560-561.

In *Smith*, however, this Court held that where there is no contention that a legal prohibition represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the legal prohibition is constitutional and consistent with the Free Exercise Clause of the First Amendment. *Smith*, 494 U.S. at 890. In the wake of this Court's holding in *Smith*, the Fifth Circuit's justification and rationale underpinning the judicial expansion of the scope of the ministerial exception in *McClure* is no longer valid.

II. TITLE VII AND THE DCHRA, THROUGH A LIMITED LEGISLATIVE CARVE-OUT, EXEMPT RELIGIOUS INSTITUTIONS FROM LIABILITY FOR EMPLOYMENT DISCRIMINATION ON THE VERY LIMITED AND NARROW BASIS OF RELIGIOUS DISCRIMINATION.

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof...*" U.S. Const. amend. I (emphasis added.)

Congress enacted Title VII in 1964 "'to ensure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin.' It creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for the vindication of those rights." *Johnson v. Railway Express Agency*, 421 U.S. 454, 457-58 (1975), *quoting Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Congress also created a religious entity exemption to Title VII, and the statute exempts religious institutions only to a narrow extent. Section 702 of Title VII, as amended, 42 U.S.C. § 2000e-1(a), provides:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Similarly, the DCHRA includes a similar religious caveat at D.C. Code Ann. § 2-1401.03(b):

> Nothing in this chapter shall be construed to bar any religious or political organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious or political organization, from limiting employment, or admission to or giving preference to persons of the same religion or political persuasion as is calculated by the organization to promote the religious or political principles for which it is established or maintained.

Accordingly, while the wording of § 702 and § 2-1401.03(b) may fairly be construed to prohibit some forms of governmental involvement in ecclesiastical decisions of employment. However, neither Title VII nor the DCHRA confer upon religious organizations a license to make employment decisions on the basis of

race, sex, or national origin. *See, e.g., EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277, 282 (5th Cir. 1981); *EEOC v. Mississippi Coll.*, 626 F.2d 477, 484 (5th Cir. 1980); *McClure*, 460 F.2d at 558. "The statutory exemption applies to one particular reason for employment decision - that based upon religious preference. It was open to Congress to exempt from Title VII the religious employer, not simply one basis of employment, and Congress plainly did not." *Rayburn*, 772 F.2d at 1166-1167. Accordingly, under the DCHRA (and Title VII) Respondents can make an employment decision based upon religious preference; however they are clearly prohibited from discriminating against their employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.[3]

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[3] Moreover, in *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000), the Court, citing *Rayburn*, held that:

> While the ministerial exception promotes the most cherished principles of religious liberty, its contours are not unlimited and its application in a given case requires a fact-specific inquiry. The ministerial exception does not insulate wholesale the religious employer from the operation of federal anti-discrimination statutes. *See Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1171-72 (4th Cir. 1985)...The existence of the ministerial exception does not derogate the profound state interest in "assuring equal employment opportunities for all, regardless of race, sex, or national origin." *Id.* at 1168.

Id. at 801.

III. THE RATIONALE UNDERLYING THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S HOLDING IN *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH.*

While the Supreme Court has long held that civil courts are constitutionally prohibited from inquiring into allegations that would involve church polity and practices, the Court also has long recognized in limited circumstances that the church is not above the law. *See, e.g., Jones v. Wolf,* 443 U.S. 595 (1979) (neutral principles applied to church property dispute). Moreover, while the Supreme Court has never directly addressed the extent of the protections afforded by the First Amendment's Free Exercise Clause when government regulation interferes with church employment relationships, the District of Columbia Court of Appeals' holding at the appellate level recognizing the ministerial exception to be a bar to suits alleging discrimination under valid and neutral employment discrimination laws cannot be reconciled with the Court's holding in *Smith.* In *Smith* the Court declared that the right of free exercise "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes... conduct that his religion prescribes." *Smith,* 494 U.S. at 879. Thus it is crucial that this Court now determine whether the Free Exercise Clause of the First Amendment of the United States Constitution exempts religious institutions from accountability for conduct proscribed by valid and

neutral State and Federal employment antidiscrimination laws.[4]

The ministerial exception to Title VII was first articulated by the Fifth Circuit in *McClure*. However, it is key to observe that the *McClure* Court also declared that, "[t]he language and the legislative history of § 702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment. *McClure*, 460 F.2d at 558. The *McClure* Court then considered the issue of whether "the application of the provisions of Title VII to the relationship between The Salvation Army and Mrs. McClure (a church and its minister) violate either of the Religion Clauses of the First Amendment?" *McClure*, 460 F.2d at 558. In its decision predating this Court's opinion in *Smith* the Fifth Circuit declared, "[w]e find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment." *McClure*, 460 F.2d at 560-561. However in *Smith* this Court held that where there is

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[4] Although this case was brought under the District of Columbia Human Rights Act, courts look to cases construing Title VII as an aid in construing the D.C. Human Rights Act, given the substantial similarity of both statutes' anti-discrimination provisions. *See Arthur Young & Co. v. Sutherland*, 631 A.2d 354 (D.C. App. 1993).

no contention that a legal prohibition represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the legal prohibition in question is constitutional and consistent with the Free Exercise Clause. *Smith*, 494 U.S. at 882, 890. In the wake of this Court's holding in *Smith*, the Fifth Circuit's justification and rationale for expanding the scope of the ministerial exception in *McClure* is no longer viable.

IV. THE COURT BELOW'S HOLDING EXPANDING THE SCOPE OF THE DCHRA'S MINISTERIAL EXCEPTION IS INCONSISTENT WITH THIS COURT'S HOLDING IN *SMITH*.

D.C. Code Ann. § 2-1401.03(b) articulates a narrow carve-out in which the Council of the District of Columbia declares its intent to exempt religious institutions from claims of religious discrimination in the workplace, yet despite the forgoing the court of appeals expanded on this legislative exemption by adopting the ministerial exception as articulated in *McClure*. Accordingly, the court of appeals declared that the ministerial exception is a bar to suits alleging any form of discrimination under the DCHRA, a valid and neutral employment antidiscrimination law, but it fails to explain why or to what extent religious institutions might be exempt from accountability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.

The court of appeals noted in its holding that the validity of the ministerial exception has been called into question by the Supreme Court's decision in *Smith*. App. 8a n. 4.[5] But the court of appeals then noted that, "we note that '[a]ll circuits to have addressed the question have recognized the continuing vitality of the [ministerial] exception after the [*Smith*] decision.' *E.E.O.C. v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 800 n* (4th Cir. 2000). These include the D.C. Circuit in *Catholic Uni . of Am., supra.*" App. 8a n. 4. Hence the court of appeals accepted the validity of the ministerial exception in the wake of the *Smith* decision, but its errant determination that the ministerial exception to the DCHRA is not precluded by this Court's holding in *Smith* threatens to undermine a fundamental protection against race discrimination in the workplace in the District of Columbia.

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[5] The court of appeals observed that Petitioner did not raise the issue of the legal validity of the ministerial exception in light of the *Smith* decision as an objection at the superior court level. App. 8a n. 4. This is because Petitioner argued at both the trial court level and on appeal that she did not fall within the ambit of ministerial exception because her job was administrative in nature and that therefore the ministerial exception was not applicable to her. App. 12a-15a, 35a-38a. Nevertheless, the court of appeals opined on the issue of the validity of the ministerial exception in the wake of the *Smith* decision, and it then declared for the first time at the appellate level that the ministerial exception a valid defense to the DCHRA, and it then held that Petitioner fell within its ambit. App. 7a, 15a.

V. APPELLATE DECISIONS ADDRESSING THE QUESTION OF THE VITALITY OF THE MINISTERIAL EXCEPTION ALL RELY ON LEGAL PRECEDENT PREDATING *SMITH*, THE DCHRA AND TITLE VII.

Several courts preceded the court of appeals in confirming the constitutional imperative of governmental non-interference with the ministerial employment decisions of churches. *See, e.g., Rayburn*, 772 F.2d at 1166; *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986); *McClure*, 460 F.2d 553. Moreover, the appellate courts that have addressed the question of the vitality of the exception after the Supreme Court's decision in *Smith* have distinguished the exception so that it might remain valid. *See Roman Catholic Diocese of Raleigh*, 213 F.3d at 800; *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *Combs v. Central Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 347-50 (5th Cir. 1999); *Catholic Univ. of Am.*, 83 F.3d at 461-63. However, these decisions all base their conclusion on the D.C. Circuit's opinion in *EEOC v. Catholic Univ. of Am., supra*, as authority for the contention that the ministerial exception is still valid in the wake of *Smith*. In turn, the D.C. Circuit in *Catholic Univ. of Am.* found that the ministerial exception survived *Smith* by relying upon this Court's holding in *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952), as authority for declaring that:

> First, the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in *Smith* and in the cases cited by the Court in support of its holding... Second, [cases invoking the ministerial exception] rely on a long line of Supreme Court cases that affirm the fundamental right of churches to 'decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine'... [and] we cannot believe that the Supreme Court in *Smith* intended to qualify th[e] century-old affirmation of a church's sovereignty over its own affairs."

83 F.3d at 462, 463 (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

However, reliance on this Court's holding in *Kedroff v. St. Nicholas Cathedral* as a basis for the asserting the validity of the ministerial exception to civil rights laws is inherently hamstrung by the simple fact that in when this Court decided *Kedroff* in 1952 *Smith*, Title VII, its progeny including the DCHRA, and their limited religious institution carve-outs, did not exist and therefore were never considered by the *Kedroff* Court.

VI. THE COURT OF APPEALS ACTED CONTRARY TO THE DCHRA BY EXPANDING THE MINISTERIAL EXCEPTION TO EXEMPT RELIGIOUS INSTITUTIONS FROM ALL LIABILITY FOR EMPLOYMENT DISCRIMINATION CLAIMS REGARDLESS OF THE BASIS OF THE CLAIMS.

In case below Respondents argued that Petitioner, as a principal of a Catholic elementary school, serves a "ministerial" function and therefore any employment decisions concerning her were thus immune from inquiry. However Respondents' act of replacing Petitioner, a Catholic, in her position of principal of a Catholic school with a non-Catholic of another race serves as clear and unambiguous evidence that the position was not ministerial in practice and that Respondents were using the ministerial exception as an artifice to avoid liability for Petitioner's claims of race-based employment discrimination. D.C. Code Ann. § 2-1401.03(b) articulates a narrow carve-out in which the Council of the District of Columbia exempted religious institutions, including Respondents, from claims of religious discrimination in the workplace. However the court of appeals has now expanded this exemption to such an absurd degree that Respondents were allowed to use it to respond to a claim of race discrimination by a Catholic when the position in question is filled by the Catholic religious institution with a non-Catholic.

There is absolutely no question that, generally, the Court can, and must, intervene on proper allegations of racial discrimination in employment,

even when that employer is a religious organization. *Rayburn*, 772 F.2d at 1168 ("It would, of course, be difficult to exaggerate the magnitude of the state's interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin.") As is evidenced in the case below, the extended scope of the religious exception is being abused, and thus the only remaining question is when the "ministerial exception" applies and to what extent it shields churches from Title VII liability.

VII. WHILE TITLE VII AND THE DCHRA CREATE A LIMITED MINISTERIAL CARVE-OUT TO EXEMPT RELIGIOUS INSTITUTIONS FROM LIABILITY FOR RELIGIOUS DISCRIMINATION CLAIMS, THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE LIMITED SCOPE OF THE MINISTERIAL EXCEPTION.

The First Amendment "protects the separation of church and state and protects the government from passing laws that 'aid in one religion, aid all religions, or prefer one religion over the other.'" *Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1001(D. Kan. 2004) (quoting *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 216 (1963)). To determine if a statute violates the Establishment Clause, the courts apply a three-prong test: "1) whether the statute has a secular purpose, 2) whether its primary effect neither advances nor inhibits religion, and, 3) whether it fosters "'an excessive government entanglement with religion.'" *Mississippi Coll.*, 626 F.2d at 486 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). Title

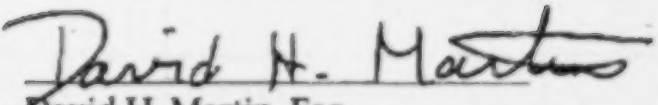
VII and DCHRA clearly have secular purposes that neither advance nor inhibit religion. However, the remaining issue is whether applying the DCHRA and Title VII to religious organizations creates excessive entanglement with religion.

Appellate courts have liberally applied a ministerial exception under the First Amendment as a shelter for religious institutions to avoid DCHRA and Title VII liability. Because both the DCHRA and Title VII create narrow carve-outs exempting religious institutions from claims of religious discrimination in the workplace and the Courts have subsequently expanded this ministerial exception beyond the parameters contemplated by the drafters of the statutes, this Court should grant certiorari to clearly delineate the appropriate parameters exempting religious institutions from claims of religious discrimination in the workplace.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



David H. Martin, Esq.
The Employment Law Group, PLLC
888 17th Street, NW
Suite 900
Washington, DC 20006
Tel. 202.331.2883
Fax. 202.261.2835
Counsel for Petitioner Kathleen Pardue

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 03-CV-1270

KATHLEEN PARDUE, APPELLANT, v.

THE CENTER CITY CONSORTIUM SCHOOLS OF THE ARCHDIOCESE OF WASHINGTON, INC., *et al.*, APPELLEES.

Appeal from the Superior Court of the
District of Columbia
(CA-5459-02)

(Hon. James E. Boasberg, Trial Judge)

(Argued May 12, 2005 Decided June 9, 2005)

[ENTERED June 9, 2005]

R. Scott Oswald for appellant.

Lisa M. Duggan, with whom *Emmet T. Flood* was on the brief, for appellees.

Before FARRELL and GLICKMAN, *Associate Judges*, and MOTLEY, *Associate Judge, Superior Court of the District of Columbia.**

FARRELL, *Associate Judge*: Appellant Kathleen Pardue ("Pardue" or "appellant") sued the Archdiocese of

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* Sitting by designation pursuant to D.C. Code § 11-707 (a) (2001).

Washington and others (collectively "the Archdiocese") under the District of Columbia Human Rights Act (the DCHRA) alleging discrimination and retaliation based on race.[1] Pardue contended that the Archdiocese had unlawfully terminated her contract as principal of the St. Francis Xavier elementary school in the District. The termination was alleged to be part of a campaign by Mary Anne Stanton, the Executive Director of the Center City Consortium Schools of the Archdiocese of Washington, Inc., and others, "to eliminate Caucasian principals and replace them with less-qualified African-American [p]rincipals." The trial court, Judge Boasberg, after allowing substantial but limited discovery, dismissed the complaint primarily on First Amendment grounds, concluding that the Free Exercise Clause – specifically the "ministerial exception" (as in religious "minister") recognized by a large number of courts – bars civil courts from adjudicating employment discrimination claims by ministers and similar persons exercising religious functions against the religious institution employing them.[2] For the reasons that follow, we uphold the decision of the trial court.

I.

St. Francis Xavier is one of several Roman Catholic elementary schools making up The Center City Consortium Schools of the Archdiocese of Washington, Inc. The Consortium is a non-profit corporation organized for charitable, religious, and educational purposes. Formed by the Archdiocese of Washington, D.C., it linked together, at the time, eight Catholic inner-city elementary schools to coordinate academics and curriculum, including religious

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1 The complaint also alleged two counts of common law breach of contract and a count of defamation (the latter subsequently withdrawn).

2 Besides dismissing the DCHRA counts on First Amendment grounds, the court rejected Pardue's contract claims for reasons discussed in part III, *infra*.

instruction, finances, development, recruitment, community relations, professional development, facilities, procurement and personnel for member schools.

Ms. Pardue served as the principal of St. Francis Xavier School from mid-1996 until January 18, 2002, when, according to the complaint, she was forced to resign to avoid being terminated immediately and not receiving the remaining payments on her one-year contract. In her lawsuit, she alleged that when she inquired why she was effectively being fired, she was told that it was "because of alleged poor enrollment numbers and lack of leadership skills," but that the real reason was her race as a Caucasian. (She alleged in particular that her replacement was a non-Catholic African-American less qualified and with significantly less experience.) The Archdiocese moved to dismiss the lawsuit principally on the ground that the Free Exercise and Establishment Clauses of the First Amendment deprived the court of subject matter jurisdiction over what essentially was an ecclesiastical dispute. Factually, the Archdiocese asserted that the reasons why Pardue had been asked to resign included her "lack of commitment to a full program of regular religious instruction" at the school and her "poor working relationship with the pastor" of the school parish. But, it asserted, Pardue should not in any event be permitted to explore through civil discovery the ecclesiastical reasons supporting her termination.

Judge Boasberg initially ruled that, to help frame the issues more clearly for him, the parties could "conduct discovery (consisting of interrogatories, document requests, and requests for admission only) on the limited topic of the role and position of the principal of St. Francis Xavier School." After receiving and considering these materials, the judge concluded in a carefully written opinion that the court lacked subject matter jurisdiction over Pardue's claims of discrimination and retaliation under the DCHRA. These

claims, he ruled, were barred by the First Amendment, in particular the "ministerial exception" to the applicability of federal anti-discrimination statutes first articulated in *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), and followed by numerous courts since then. As explained by the District of Columbia Circuit, the exception holds that "the Free Exercise Clause exempts the selection of clergy from Title VII and similar statutes and, as a consequence, precludes civil courts from adjudicating employment discrimination suits by ministers against the church or religious institution employing them." *EEOC v. Catholic Univ. of Am.*, 317 U.S. App. D.C. 343, 349, 83 F.3d 455, 461 (1996). Pointing out that the exception, as applied by the courts, "encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission," *id.* at 351, 83 F.3d at 463, Judge Boasberg analyzed the position of principal at St. Francis Xavier applying the "primary duties" test – endorsed by both sides – enunciated in *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985):

> As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered "clergy." This approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church.

Id. at 1168 (citations and internal quotation marks omitted). The judge cited documentary evidence that the Catholic schools in the Archdiocese have a "pervasive religious mission" and that "the principal of each school has a significant religious and spiritual role in furthering that

mission." He noted also Pardue's admission that "the . . . school is operated in accordance with the teachings and doctrines of the Roman Catholic Church as delineated and set forth by the Ordinary of Washington," and that "she was responsible for hiring teachers who could teach the Catholic courses . . . [and] made certain that students attended mass pursuant to Archdiocesan policy and guidelines." In sum, the judge concluded:

> [T]he principal, along with the pastor [of St. Francis Xavier parish], is the person who leads the school, the person who communicates the school's message to the faculty, staff, students and parents. Given the role the schools play in the Archdiocese and the role the principal plays at the school, it is clear that [Pardue's] "position is important to the spiritual mission of the church" . . . and that her "primary duties consist of teaching [and] spreading the faith." Indeed, the selection of [Pardue] to be principal of the school "places the imprimatur of the church upon that person as a worthy Spiritual leader." Given [Pardue's] role, the Court finds that she fits within the ministerial exception, thus depriving the Court of subject matter jurisdiction to consider [her claims under the DCHRA]. [Citations omitted].

II.

Judge Boasberg noted that this court "has not directly considered the existence or scope of the 'ministerial exception.'" While that is true especially as to the scope of the exception — *i.e.*, who, other than an actual clergy person, may be barred from challenging an employment decision — the court has all but expressly adopted the

exception in previous cases where actual ministers and pastors challenged their termination or other adverse actions affecting their employment. Thus, in *United Methodist Church, Baltimore Annual Conference v. White*, 571 A.2d 790 (D.C. 1990), we relied significantly on the exposition of First Amendment principles in *Rayburn, supra*, when we explained:

> [t]he right to choose a minister without judicial intervention "underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and the world at large." Any attempt by the civil courts to limit the church's choice of its religious representatives would constitute an impermissible burden on the church's First Amendment rights.

Id. at 794 (citing *inter alia* and quoting *Rayburn*, 772 F.2d at 1167-68). Although we recognized that "courts of appeal have held that the church is not above the law and may be held liable," among other things, "for valid contracts," *id.* at 795, we concluded that the complaint by White, an ordained Methodist minister, for reinstatement and damages stemming from his divestment from religious office could not properly be evaluated without intrusion into "church polity and practices," *id.* at 795, "matters protected from secular judicial scrutiny." *Id.* at 794

Similarly, in *Heard v. Johnson*, 810 A.2d 871 (D.C. 2002), a suit for defamation and other common-law torts by a pastor against a congregation (Mt. Airy Baptist Church) that had removed him from office, we ordered dismissal of the suit because, in the circumstances presented, "resolution

of the claim[s] would require an impermissible inquiry into the church's bases for its action." *Id.* at 883. Although, we explained, the Supreme Court had "recognized that the religion clauses allow for some state restriction, weighing the free exercise protections against important state interests requires a 'delicate balancing.'" *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978)). And "[i]n the specific area of the church-minister relationship, . . . courts have expanded the universe of claims that do not overcome the First Amendment protections to include Civil Rights Act protection from race and sex discrimination and a variety of common law claims." *Id.* (citing *inter alia Rayburn, supra*). We held that, because "selection and termination of clergy is a core matter of ecclesiastical self-governance not subject to interference by a state, . . . the Free Exercise Clause guarantees Mt. Airy the freedom to decide to whom it will entrust ministerial responsibilities." *Id.* at 882. "Whose voice speaks for the church is *per se* a religious matter." *Id.* at 884 (quoting *Minker v. Baltimore Annual Conference of United Methodist Church*, 282 U.S. App. D.C. 314,316, 894 F.2d 1354, 1357(1990)).

Making explicit what is implicit in the foregoing decisions, we hold that the ministerial exception as applied in the case of federal statutes may be raised as a bar to suits alleging discrimination under the DCHRA. Although "[i]t would . . . be difficult to exaggerate the magnitude of [the District's] interest in assuring equal employment opportunities for all, regardless of race, sex, or national origin," *Rayburn*, 772 F.2d at 1168,[3] abundant decisional law from this court and others confirms "the constitutional imperative of governmental non-interference with the ministerial employment decisions of churches." *EEOC v. Roman Catholic Diocese*, 213 F.3d 795 (4th Cir. 2000). *See also,*

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[3] No one disputes that, as a matter of statutory interpretation, the DCHRA would prohibit termination from employment on the grounds alleged by Pardue.

e.g., Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); *EEOC v. Catholic Univ. of Am.*, *supra*; *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575 (1st Cir. 1989); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986); *McClure v. Salvation Army*, *supra*.[4] But "[w]hile the ministerial exception promotes the most cherished principles of religious liberty, its contours are not unlimited and its application in a given case requires a fact-specific inquiry." *Roman Catholic Diocese*, 213 F.3d at 801. "The ministerial exception does not insulate wholesale the religious employer from the operation of . . . anti-discrimination statutes," *id.*; "[f]or instance, the exception would not apply to employment decisions concerning purely custodial or administrative personnel." *Id.*; *see also Heard*, 810 A.2d at 880 ("Civil courts . . . may have jurisdiction over employment disputes where the employee provides a purely secular service for the church."). "Rather, the exception shelters certain employment decisions from the scrutiny of civil authorities so as to preserve the independence of religious institutions in performing their spiritual functions." *Roman Catholic Diocese*, 213 F.3d at 801.

We therefore proceed to consider application of the exception to Pardue's claims of discrimination and retaliation under the DCHRA. Preliminarily, however, we

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[4] Pardue makes no argument that the validity of the ministerial exception has been called into question by the Supreme Court's decision in *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (holding, in the context of a state's law including religiously inspired peyote use within the reach of its criminal drug statutes, that the right of free exercise "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . .). Although we accordingly have no occasion to treat the issue, we note that "[a]ll circuits to have addressed the question have recognized the continuing vitality of the [ministerial] exception after the *[Smith]* decision." *Roman Catholic Diocese*, 213 F.3d at 800 n*. These include the D.C. Circuit in *Catholic Univ. of Am.*, *supra*.

must decide what standard of review governs our consideration of Judge Boasberg's decision.

A.

Courts have resolved claims presenting application of the ministerial exception under Fed. R. Civ. P. 12(b)(1) (lack of jurisdiction over the subject matter), Rule 12(b)(6) (failure to state a claim upon which relief can be granted), and Rule 56 (summary judgment). *See Dolquist v. Heartland Presbytery*, 342 F. Supp. 2d 996, 1002 (D. Kansas 2004) (listing cases). Our own decisions most analogous to this case teach that the Archdiocese's motion to dismiss on First Amendment grounds is properly analyzed as a challenge to subject matter jurisdiction under Super. Ct. Civ. R. 12(b)(1). In *Heard* and *White*, *supra*, as well as *Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith v. Beards*, 680 A.2d 419 (D.C. 1996), we treated similar challenges as an "argu[ment] for . . . immunity from suit, and for the trial court's corresponding lack of subject matter jurisdiction." *Id.* at 426. *See Heard*, 810 A.2d at 877 (trial court's denial of motion to dismiss under Rule 12(b)(1) presented "question of immunity from suit under the Free Exercise Clause"); *White*, 571 A.2d at 793 (reviewing under Rule 12(b)(1) church's "motion to dismiss on grounds of constitutional immunity"). We accordingly review the judge's order under the standards appropriate to a Rule 12(b)(1) motion. First, "our standard of review is *de novo* because 'the issue of subject matter jurisdiction is a question of law.'" *Heard*, 810 A.2d at 377 (quoting *Bible Way*, 680 A.2d at 427). Also, whereas a court in deciding an issue on summary judgment must construe the facts in the light most favorable to the plaintiff and draw all reasonable inferences in her favor, *see, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), matters are different when, as in this case, the defendant has made a "factual" attack on the court's subject matter jurisdiction supported by materials outside the face of the complaint. *See Heard*, 810 A.2d at 878 ("The [church] Trustees' 12 (b)(1) motion . . . was a 'factual' attack because . . . it 'challenge[d] the existence of subject matter jurisdiction irrespective of the pleadings, and matters outside the pleadings . . . are considered.'") (citations omitted). In such a case "plaintiff bears the burden of proof that jurisdiction does in fact

exist," *id.* (citation and quotation marks omitted), and "no presumptions of truthfulness adhere to the allegations of the complaint." *Id.; see Bible Way*, 680 A.2d at 426 n.4 ("[w]here the motion [to dismiss] concerns matters outside the complaint, it is a 'factual' attack and the court is free to weigh the evidence without any presumptions regarding its truthfulness.").

B.

Applying these standards and the substantive test which the ministerial exception prescribes, we hold that Judge Boasberg correctly found Ms. Pardue's claims under the DCHRA to be barred for lack of subject matter jurisdiction. "Our inquiry . . . focuses on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister.'" *Roman Catholic Diocese*, 213 F.3d at 801. As mentioned earlier, the "general rule" followed by the cases, and applied by the trial judge here, is that

> "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered clergy." A court must therefore "determine whether a position is important to the spiritual and pastoral mission of the church" in order to decide whether the ministerial exception applies.

Id. (quoting *Rayburn*, 772 F.2d at 1169).[5]

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[5] Whether the exception applies involves no inquiry into the reasons alleged by either party for the adverse action in question. "The exception[, if applicable,] precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision, for the Free Exercise Clause 'protects the act of a decision rather than a motivation behind it.'" *Roman Catholic Diocese*, 213 F.3d at 801 (quoting *Rayburn*, 772 F.2d at 1169).

In a case concerning the Roman Catholic elementary schools of Rhode Island, the Supreme Court explained some years ago that "instruction in faith and morals is part of the total educational process" of those schools and that "the parochial schools constituted 'an integral part of the religious mission of the Catholic Church.'" *Lemon v. Kurtzman*, 403 U.S. 602, 615-16 (1971); *accord NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979) (quoting *Lemon*, 403 U.S. at 602) ("Religious authority necessarily pervades the [parochial] school system."). Based on the evidence before him, Judge Boasberg found that the relationship of the parochial schools of Washington, D.C. to the Church's mission is no different:

> "The Mission of Catholic Schools in the Church of Washington" is a document that begins: "Catholic schools are rooted in the belief that Jesus, the only mediator between God and man, is alive today within the community of the faithful, the Church. This Church has but one mission: to proclaim the Good News that the Father has reconciled all men to Himself in Jesus." Mot., Tab I, Exh. 10. Similarly, the "Catholic Schools Office Mission Statement" begins: "Central to our belief, our leadership, and our service with and on behalf of the Catholic schools of the Washington Archdiocese is our conviction that . . . *the Catholic school is an integral part of the Church's mission to proclaim the Gospel, to build faith communities, to celebrate through worship, to serve others.*" *Id.*, Exh. 6 (italics in original); *see also Id.*, Exh. 9 ("Guiding Principles for the Schools in the Archdiocese of Washington") ("As Christian institutions committed to the teachings of the Catholic Church, Catholic schools prepare students to

> respond in faith to Jesus Christ and to understand His message . . . ."). Finally, the "Criteria For Religious Programs" begins: "In order to preserve the uniqueness of the Catholic schools, not only should the Catholic faith permeate all aspects of the life of the school but also each school must offer a program of religious education .... *Id.*, Tab J at 1; *see also id.*, Tab I, Exh. 12 ("Instructional goals") (first goal states: "Students will master the essentials of Catholic doctrine and principles of morality, understand Catholic liturgy with the Mass as its center, be familiar with the Scriptures, and be able to outline the historical development of the Church.").

In her brief, Pardue does not dispute the pervasive religious mission of the Catholic schools in the Archdiocese, but contends that the trial judge failed to consider the duties actually performed by a principal at one of the Archdiocese's schools. *See* Br. for App. at 15 ("In fact, the trial court never discussed the functions of Pardue's position that caused it to designate her position as ministerial."). However, the very next portion of the judge's opinion reads:

> Given the pervasive religious mission of the Catholic schools in the Archdiocese, it is not surprising to find that the principal of each school has a significant religious and spiritual role in furthering that mission. For example, the "Major Areas of Responsibility" for the principal begins with "spiritual leadership." *Id.*, Tab I, Exh. 5. Likewise, the performance evaluation lists as the first category: "Provides spiritual leadership in and for the school community." *Id.*, Exh. 3. Indeed, the contract that [Pardue] signed obligated her to

> "aid in the Christian formation [o]f students," *id.*, Exh. 1, ¶ A; [Pardue] therein also "recognize[d] that the . . . school is operated in accordance with the teachings and doctrines of the Roman Catholic Church as delineated and set forth by the Ordinary of Washington," *id.*, ¶ C; and she also admitted having "seen and reviewed a copy of the Guiding Principals [*sic*], Goals and Objectives of the Archdiocese of Washington." *Id* ¶ E.
>
> Additionally, [Pardue] admitted "she was responsible for hiring teachers who could teach the Catholic courses . . . [and] made certain that students attended mass pursuant to Archdiocesan policy and guidelines." Mot., Tab M (Plaintiff's Answers to Interrogatories) at 2. She similarly conceded that "one of her many duties was to work with the pastor to ensure that the administrative aspects of the religious education program [were] being met and were in conformity with the policy and guidelines of the Archdiocese of Washington." Mot., Tab H (Responses to Requests for Admission) at 3.

Despite this evidence of what the judge found to be the principal's essential role in "communicat[ing] the school's message" — one rooted in religious belief — "to the faculty, staff, student, and parents," Pardue makes essentially two arguments disputing the characterization of her position as ministerial. First, she asserts that the judge unfairly minimized evidence — chiefly in the form of affidavits by former executives in the Archdiocese hierarchy — that most of Pardue's daily responsibilities were "administrative" and basically no different from those

performed by her counterparts in public schools. But, as Judge Boasberg recognized, merely enumerating the duties in Pardue's job description, many under secular-sounding headings such as "materials management" and "office management," tells us little about whether her "position is important to the spiritual and pastoral mission of the church." *Rayburn, supra*. Pardue was the chief administrator of an institution both educational and religious. Hence she would certainly be expected to perform numerous duties – secular in appearance – designed to meet public licensing requirements and to maintain the standing of the institution *as* school. But she was also principal of a Roman Catholic school, and thus she, more than anyone else at the school except the pastor, *see* discussion, *infra*, was answerable to the religious authorities for providing, in myriad ways not reducible to a listing of tasks, "spiritual leadership in and for the school community." As the evidence before the trial court makes clear, these many responsibilities – some predominantly "secular" and some predominantly religious – are inextricably intertwined in the school's mission and in the principal's role in fulfilling it.

Appellant further seeks to identify in the materials a clear distinction in the operation of the school between the roles of principal and pastor of the sponsoring church parish. She points to, for example, a statement in the "Guidelines for Pastors and Principals" that, while "the pastor may delegate many of the tasks involved in the administration of the parish school, . . . the pastoral office is morally and canonically such that he can never relinquish his responsibility." These and similar statements, Pardue asserts, unequivocally make the pastor the chief religious educator for the parish school – leaving the "ministerial" function, for First Amendment purposes, exactly where the Archdiocese placed it. But, as the trial judge recognized, even if the principal were subordinate to the pastor in regard to purely religious decisionmaking, "there is no

requirement that an individual have the 'final say' on spiritual matters before the ministerial exception can be applied." *Roman Catholic Diocese*, 213 F.3d at 803. And in fact the record shows that the relationship of pastor and principal in the schools of the Archdiocese, rather than one of primacy, is more akin to joint responsibility or coequal authority in carrying out the spiritual objectives of the school. So, for example, the "Guidelines," *supra*, provide that the pastor "in consultation with the principal and religious education coordinator helps select an appropriate set of religious education textbooks"; "along with the principal" he "arranges how he and/or his associates . . . can best reinforce religious education programs of the school"; "in cooperation with the principal" he provides "for school liturgies and parish liturgies for young people"; and "in collaboration with the principal" he "ensures that all archdiocesan educational policies are followed in the local school." This shared responsibility confirms rather than diminishes the ministerial role of the principal, who (the "Guidelines" tell us) "has the dual responsibility of administering an educational institution and at the same time ensuring that it serves the needs of the entire parish community." In this setting of a joint supervisory relationship of principal and pastor, the observation of the court in *Minker*, 282 U.S. App. D.C. at 316, 894 F.2d at 1356, that deciding "'whose voice speaks for the church' is *per se* a religious matter" rings particularly true.

Appellant's remaining argument, a procedural one, has not been adequately preserved. At oral argument she maintained that Judge Boasberg's order limiting discovery to "interrogatories, document requests, and requests for admission only" denied her the ability through depositions to test and impeach the various documentary submissions by the Archdiocese describing the functions of a school principal. The argument came largely as a surprise, however, because the only mention of it in either of

appellant's briefs on appeal is the single statement in the "Summary of the Argument" section of her opening brief that Pardue "was never given the opportunity to ... engage in substantive discovery." Without further explication, that is inadequate to preserve a claim that the discovery limitations unfairly hampered appellant's ability to meet the defendants' jurisdictional attack. Indeed, appellant cites no place where she objected at the trial court level to the limits placed on her discovery; our own review reveals only that when the judge announced in open court his intent to limit discovery, appellant's counsel stated that "we would accept that and would agree with the Court," even though "[w]e would want it a little more expansive." That does not constitute an objection, and at no later point does it appear Pardue ever asked the judge to revisit the limitations on discovery. In any event, the control of discovery lies within the sound discretion of the trial judge, *see, e.g., Kay v. Pick*, 711 A.2d 1251, 1256 (D.C. 1998), and particularly "when the First Amendment casts a shadow over the court's subject matter jurisdiction," *Bible Way*, 680 A.2d at 430, the judge acts responsibly in limiting the intrusiveness of the discovery afforded. *See White*, 571 A.2d at 792 (pointing out that the religion clauses "grant churches an immunity from civil discovery and trial under certain circumstances").

III.

Besides her claims under the DCHRA, Pardue's complaint alleged two counts of breach of contract. The first charged that the Archdiocese had breached an implied covenant of good faith and fair dealing in seeking her resignation as principal; and the second alleged, very narrowly, that the Archdiocese had failed to pay her salary

for the month of July 1998.[6] The trial judge ultimately dismissed both claims, and we find no error in that ruling.

First, Judge Boasberg did not err in concluding that Pardue's claim of breach of the implied covenant of good faith, no less than her discrimination claims, was barred by the ministerial exception. In essence Pardue alleged that she was terminated for ulterior reasons of race, hence not in "good faith," but, as the judge recognized, evaluation of that claim would require the very inquiry into the Archdiocese's motivation that the Free Exercise Clause forbids. *See Rayburn*, 772 F.2d at 1169 (the clause "protects the act of a decision rather than a motivation behind it"); *White*, 571 A.2d at 795-96 (complaint alleging that plaintiff's "ordination and various church appointments g[a]ve rise to an ... implied covenant[] of good faith and fair dealing" should have been dismissed; the "complaint link[ed] the circumstances of his contractual rights and alleged breaches to the circumstances surrounding his ordination and divestment of ecclesiastical endorsement," matters for the church alone to decide); *Bell v. Presbyterian Church*, 126 F.3d 328, 331-32 (4th Cir. 1997) (applying ministerial exception to reject claim by ordained minister that his termination breached an implied covenant of good faith and fair dealing).

Pardue's second claim for breach of contract is that the Archdiocese failed to pay her salary for July 1998. She contends that she had a contract covering the period from August 1, 1997 to July 31, 1998, and a succeeding contract from July 1, 1998, to June 30, 1999. Inadvertently or not, she contends, the defendants agreed to pay her twice for the month during which the two contracts overlapped. We agree with appellees, however, that the three-year statute of

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[6] Appellees assert that even under liberal notice pleading, the complaint failed to make the second allegation with sufficient particularity, an issue it is unnecessary for us to decide.

limitations for breach of contract barred this claim. *See* D.C. Code § 12-301(7)(2001). The complaint was filed on July 3, 2002, almost four years after the alleged failure to pay Pardue twice. *See Sears, Roebuck & Co. v. Goudie*, 290 A.2d 826, 830 (D.C. 1972) (the "statute of limitations in an action for breach of contract. . . runs from the time of the breach or completion of the contract"). As the alleged breach occurred in the contract year ending July 31, 1998, any contract claim tied to that date expired in July 2001 (a year or slightly less before Pardue filed her complaint). Appellant makes the strained argument that the breach was "recurring" and continued indefinitely while the month's salary was unpaid – all the way up to her termination in January 2002 (and beyond). She cites no case law for this proposition, and we reject it. Pardue was not, as she asserts, "always behind one [month's] payment"; rather, she was paid in full for each succeeding month of employment. It is the alleged failure to pay her (double) in July 1998 only that gave rise to her claim and marked the accrual of her cause of action. *See Toomey v. Cammack*, 345 A.2d 453, 455 (D.C. 1975) ("As a general rule, an actionable claim accrues, and the statute of limitations begins to run, when a suit thereon could first be maintained to a successful conclusion."). Appellant does not contend that she could not reasonably have discovered the claim at that time; rather she knew, or reasonably should have known, when she received her paycheck for that month that it did not reflect a double payment.

The judgment of the Superior Court is

Affirmed.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KATHLEEN PARDUE,	:	
	:	
Plaintiff,	:	**Civil Action**
	:	**No.: 02-5459**
v.	:	**Judge Boasberg**
	:	**Calendar 10**
THE CENTER CITY	:	
CONSORTIUM SCHOOLS	:	
OF THE ARCHDIOCESE OF	:	
WASHINGTON, INC., et al.,	:	
	:	
Defendants.	:	**[ENTERED October 24, 2003]**

ORDER GRANTING DEFENDANTS' RENEWED MOTION TO DISMISS COUNTS III, IV, AND VI

The Court has reviewed Plaintiffs Notice in Support of Plaintiffs Breach of Contract Claim, Plaintiffs Statement of Position on Implied Covenant of Good Faith and Fair Dealing, Defendants' Opposition and Renewed Motion to Dismiss Counts III, IV, and VI, and Plaintiffs Reply.

I. Background

In its Order of July 29, 2003, the Court held that it lacked subject matter jurisdiction to consider Plaintiffs discrimination claims. In a status conference on August 1, 2003, the Court discussed with the parties the viability of Plaintiff s remaining claims and asked Plaintiff to submit a motion explaining why she could proceed on those causes of action in light of the Court's previous Order. Plaintiff has now done so, and Defendants have countered with their Motion to dismiss the remaining counts, which are for breach of contract -- damages (III), breach of contract --

specific performance (IV), and breach of the implied covenant of good faith and fair dealing (VI).

II. Legal Standard

The Court addressed this issue in regard to subject matter jurisdiction in its July 29, 2003, Order. That language applies equally to Counts IV and VI, but the issue of whether Plaintiff received all payments under her contract is a matter that should be resolved under the summary judgment standard since the parties have relied on evidence outside the pleadings.

Under such standard, in order to prevail on a motion for summary judgment, the moving party must demonstrate, based on the pleadings, discovery, and any affidavits submitted, that there is no genuine issue as to any material fact and that it is thus entitled to judgment as a matter of law. Grant v. May Department Stores Co., 786 A.2d 580, 583 (D.C. 2001); Rule 56(c). A trial court considering a motion for summary judgment must view the pleadings, discovery materials, and affidavits in the light most favorable to the non-moving party and may grant the motion only if a reasonable factfinder, having drawn all reasonable inferences in favor of the non-moving party, could not find for the non-moving party based on the evidence in the record. Id. at 583 (citing Nader v. De Tolendano, 408 A.2d 31, 42 (D.C. 1979)); Bailey v. District of Columbia, 668 A.2d 812, 816 (D.C. 1995).

III. Analysis

A. Implied Covenant of Good Faith and Fair Dealing

Count VI of Plaintiffs Amended Complaint alleges that Defendants breached the implied covenant of good

faith and fair dealing by improperly discharging Plaintiff. Indeed, the count is labeled "Wrongful Discharge / Breach of the Implied Covenant of Good Faith and Fair Dealing." Amended Complaint at 17. In arguing that this Court has subject matter jurisdiction over such cause of action, Plaintiff maintains that "this claim arises out of the contract Defendant had with Plaintiff and is limited to issues surrounding that contract." Statement at 3.

Yet this is precisely why the claim is barred. As the Court concluded in its July 29 Order, "the ministerial exception 'precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decisions . . . for the Free Exercise Clause "protects the act of a decision rather than a motivation behind it."'" Order at 13 (quoting EEOC v. Roman Catholic Diocese of Raleigh, North Carolina, 213 F.3d 795, 803 (4th Cir. 2000) (quoting Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1165 (4th Cir. 1985)). In other words, the Court cannot delve into whether Defendants' termination of Plaintiff s contract was in good faith or not because the Court cannot look into motivations at all.

In United Methodist Church v. White, 571 A.2d 790 (D.C. 1990), Plaintiff, a minister at the defendant church, sued on a number of grounds for wrongful termination. Among those, he alleged "that his ordination and various church appointments give rise to an implied contract and implied covenant of good faith and fair dealing." Id. at 795. Although not discussing Rayburn's "ministerial exception," see Order of July 29 (discussing exception), the Court of Appeals did hold that Plaintiff's "complaint links the circumstances of his contractual rights and alleged breaches to the circumstances surrounding his ordination and divestment of ecclesiastic endorsement." Id. at 796. Such matters were for church, not court, officials. Id.

More directly on point, the Fourth Circuit in Bell v. Presbyterian Church, 126 F.3d 328 (4th Cir. 1997), affirmed a lower court's dismissal on subject matter jurisdiction grounds of the suit of an ordained minister for termination from his position. He alleged, *inter alia*, that the defendants had breached the covenant of good faith and fair dealing. The Fourth Circuit rejected the plaintiffs characterization that this was "a secular dispute between the churches and a third party." Id. at 332.

Similarly, here, Plaintiff cannot circumvent the ministerial exception by simply labeling his claim as one for breach of the covenant of good faith and fair dealing. There is no reason to distinguish this cause of action from his ones for discrimination insofar as subject matter jurisdiction is concerned.

B. Breach of Contract

In her Notice, Plaintiff asserts that she has a valid breach of contract claim (Count III) in regard to Defendants' failure to pay her salary for July 1998. Notice at 2.[1] More specifically, Plaintiff contends that she had a contract covering the period from August 1, 1997, to July 31, 1998, for the annual salary of $39,000. Id. She also had a contract from July 1, 1998, to June 30, 1999, for $40,560. Id. She claims that she was thus entitled to two payments for July 1998 since that month is covered in both contracts.

Defendants make three arguments in response, all of which appear persuasive to the Court. First, such claim has not been pled in Plaintiffs Amended Complaint, which

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[1] Although Plaintiff does not mention this in her Notice or Reply, it seems that Count IV (as opposed to Count III) actually seeks specific performance – namely, that Defendants mediate her employment dispute. Amended Complaint at 15-16. Even if Plaintiff had not abandoned this count, which appears to be the case, it would be dismissed for the same reasons that Counts I, II, and VI are infirm.

makes no allegation about non-payment in 1998 and implies only that she was not folly paid on her 2001-02 contract after her forced resignation. Second, even if it had been pled, such claim is clearly barred by the statute of limitations, which allows suit within three years for breach of contract. D.C. Code § 12-301(7). The Complaint in this case was filed on July 3, 2002, almost four years after the alleged breach. There is, furthermore, no issue about discovery of the breach since Plaintiff clearly knew at the time that she had not been paid twice for July 1998. Third, even had the claim been properly pled and timely filed, the Court would find, as a matter of law, that the second contract supersedes the first under the law of substitute contracts. See Restatement (Second) of Contracts § 279 and comment.

The Court, accordingly, ORDERS that:

1. Defendants' Motion is GRANTED; and

2. The remaining counts (III, IV, and VI) are DISMISSED.

IT IS SO ORDERED.

October 24, 2003
Date

James E. Boasberg
Judge

Copies mailed to:

R. Scott Oswald, Esquire
1850 M St., NW, Suite 920
Washington, DC 20036-5820
Emmet Flood, Esquire
Lisa Duggan, Esquire
725 - 12th St., NW
Washington, DC 20005

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KATHLEEN PARDUE,	:	
	:	
Plaintiff,	:	**Civil Action**
	:	**No.: 02-5459**
v.	:	**Judge Boasberg**
	:	**Calendar 10**
THE CENTER CITY	:	
CONSORTIUM SCHOOLS	:	
OF THE ARCHDIOCESE OF	:	
WASHINGTON, INC., et al.,	:	
	:	
Defendants.	:	**[ENTERED**
		October 24, 2003]

JUDGMENT

The issues having been duly considered and the Court having duly rendered its decision this date, it is ORDERED that Plaintiff takes nothing, that JUDGMENT is hereby entered in favor of Defendants, and that Defendants recover their cost of action.

October 24, 2003
Date

James E. Boasberg
Judge

Copies mailed to:

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KATHLEEN PARDUE,	:	
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THE CENTER CITY	:	
CONSORTIUM SCHOOLS	:	
OF THE ARCHDIOCESE OF	:	
WASHINGTON, INC., et al.,	:	
	:	
Defendants.	:	**[ENTERED:**
		July 29, 2003]

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Court has reviewed Defendants' Motion for Summary Judgment, Plaintiffs Opposition, and Defendants' Reply. As set forth below, the Court finds that the Free Exercise Clause of the First Amendment deprives the Court of subject matter jurisdiction over Plaintiffs discrimination claim.

I. Background

Plaintiff Kathleen Pardue served as principal of St. Francis Xavier School, a Roman Catholic elementary school, until her forced resignation in January 2002. Claiming reverse race discrimination, she has brought the instant suit against three defendants: Center City Consortium Schools of the Archdiocese of Washington ("the Consortium"), which runs eight local schools including St. Francis Xavier; the Archdiocese of Washington; and Mary Anne Stanton, the Executive Director of the Consortium. Plaintiffs central

claim is founded on the District's Human Rights Law, although she has also asserted a number of common law causes of action related to specific payments under her contract.

Defendants initially moved to dismiss the discrimination claim on the ground that, under the Free Exercise Clause, the Court lacked subject matter jurisdiction over this ecclesiastical dispute. In order to frame more clearly the First Amendment issues, the Court denied the motion without prejudice and permitted limited discovery on the role and position of the principal of St. Francis Xavier. See Rayburn v. General Conference of Seventh-Dav Adventists, 772 F.2d 1164, 1165 (4th Cir. 1985) (permitting "[l]imited discovery focused on the nature of [the job at issue]" in case where Free Exercise Clause raised as defense). The parties having engaged in such discovery, Defendants have now renewed their argument regarding lack of subject matter jurisdiction in this Motion for Summary Judgment.

II. Legal Standard

"The issue of subject matter jurisdiction is a question of law." Heard v. Johnson, 810 A.2d 871, 877 (D.C. 2002); see also Miller v. Bay View United Methodist Church. Inc., 141 F. Supp. 2d 1174, 1181 (E.D. Wise. 2001) ("The applicability of the ministerial exception is a question of law for the court."); EEOC v. Southwestern Baptist, 651 F.2d 277, 285 (5th Cir. 1981).

Both sides agree that the normal summary judgment standard applies here as to the Court's determination of this legal issue. See Mot. at 4-5; Opp. at 7-8. Under such standard, in order to prevail on a motion for summary judgment, the moving party must demonstrate, based on the pleadings, discovery, and any affidavits submitted, that there is no genuine issue as to any material fact and that it is

thus entitled to judgment as a matter of law. Grant v. May Department Stores Co., 786 A.2d 580, 583 (D.C. 2001); Rule 56(c). A trial court considering a motion for summary judgment must view the pleadings, discovery materials, and affidavits in the light most favorable to the non-moving party and may grant the motion only if a reasonable factfinder, having drawn all reasonable inferences in favor of the non-moving party, could not find for the non-moving party based on the evidence in the record. Id, at 583 (citing Nader v. De Tolendano, 408 A.2d 31, 42 (D.C. 1979)); Bailev v. District of Columbia, 668 A.2d 812,816(D.C. 1995).

The parties' agreement on the standard notwithstanding, it is arguable that "a Rule 56 motion for summary judgment is not an appropriate method for challenging subject matter jurisdiction." Miller, 141 F. Supp. 2d at 1177 (citation omitted). Instead, a motion to dismiss is the proper vehicle. Id. In any event, the standard would not be greatly different were the Court to evaluate the case under Rule 12(b)(l), as opposed to Rule 56. See id. ("court notes that it must. . . draw reasonable inferences in favor of the plaintiff) (citation omitted); Alicea-Hernandez v. Catholic Bishop of Chi., 320 F.3d 698, 701 (7th Cir. 2003) ("When considering a motion to dismiss for lack of subject matter jurisdiction, a court must . . . draw all reasonable inferences in favor of the plaintiff.") (citation omitted).

It is also possible, however, that inferences should not be resolved in favor of the Plaintiff at all. A Rule 12(b)(l) motion for lack of subject matter jurisdiction may be "a 'factual' attack on the basis of the Court's jurisdiction." Heard, 810 A.2d at 877 (citations omitted). In other words, the motion is based on facts outside the pleadings, which is the case here. Where a factual attack is made, "plaintiff bears the burden of proof that jurisdiction does in fact exist." Id. at 878 (citations and internal quotations omitted). In such a

circumstance, "no presumptions of truthfulness adhere to the allegations of the complaint." Id. (citations omitted).

Since the Court would reach the same conclusion under any of the above standards, further resolution of this issue is not necessary.

III. Analysis

A. Discrimination Claim

1. Rayburn *Standard*

When employees of religious institutions bring discrimination suits against their employers, courts are required to engage in a unique balancing of interests. As the D.C. Circuit has explained: "[Such a] case presents a collision between two interests of the highest order: the Government's interest in eradicating discrimination in employment and the constitutional right of a church to manage its own affairs free from governmental interference." EEOC v. The Catholic University of America, 83 F.3d 455, 460 (D.C. Cir. 1996). In support of a religious institution's right to be free from such interference, the "Supreme Court has recognized that government action [which includes judicial action] may burden the free exercise of religion, in violation of the First Amendment, ... by encroaching on the ability of a church to manage its internal affairs." Id. (citation omitted); see also Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976) ("civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law"). As a result, many courts "have long held that the Free Exercise Clause exempts the selection of clergy from Title VII and similar statutes and, as a consequence, precludes civil courts from adjudicating employment discrimination suits by ministers against the

church or religious institution employing them." Id. at 461 (citing cases).

The employee, however, need not be an actual minister in order for the Court to be deprived of subject matter jurisdiction. As the Fourth Circuit explained in the seminal Rayburn case, "The 'ministerial exception' to Title VII first articulated in McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972), does not depend upon ordination but upon the function of the position." 772 F.2d at 1168 (citation omitted). The Court then articulated the test to be employed in making this determination:

> As a general rule, if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship, he or she should be considered "clergy." This approach necessarily requires a court to determine whether a position is important to the spiritual and pastoral mission of the church.

Id. (citation, internal citation, and internal quotation omitted); see also Catholic University, 83 F.3d at 463 ("the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission") (citing Rayburn, 772 A.2d at 1169).

Although our Court of Appeals has not directly considered the existence or scope of the "ministerial exception,"[1] the D.C. Circuit and other circuits have recognized this exception, and many have applied the

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[1] But see Heard, 810 A.2d at 880 (mentioning issue briefly in *dicta*); United Methodist Church v. White, 571 A.2d 790, 794 (D.C. 1990) (citing Rayburn, but not mentioning ministerial exception, in case discussing Church's right to choose its minister without judicial intervention).

Rayburn test. See, e.g., Catholic Univ., 83 F.3d at 461 (D.C. Cir.) (applying test); Alicea-Hernandez, 320 F.3d at 703 (7th Cir.) (applying test); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 656 (10th Cir. 2002) (recognizing exception, but not reaching issue of its definition); EEOC v. Roman Catholic Diocese of Raleigh, North Carolina, 213 F.3d 795, 801 (4th Cir. 2000) (applying test); Gellington v. Christian Methodist Episcopalian Church, Inc., 203 F.3d 1299, 1304 (11th Cir. 2000) (recognizing validity of exception but not considering its definition); Starkman v. Evans, 198 F.3d 173, 175-76 (5th Cir. 1999) (applying test); Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940, 948 (9th Cir. 1999) (recognizing exception in discussing Rayburn, but not the particulars of the test). As a result, both sides acknowledge here that this is the proper test the Court should employ to determine if Plaintiff fits within the "ministerial exception" so as to deprive the Court of subject matter jurisdiction. See Mot. at 5-6; Opp. at 12. The Court concurs.

2. *Spectrum of Employees*

To articulate the standard, however, is certainly not to answer the question here presented. There is a wide spectrum on which to place different types of employees, and the greatest difficulties occur, not surprisingly, in the middle of such spectrum. For example, there is little doubt that the First Amendment protects religious employers from discrimination claims brought by actual ministers. See, e.g., Mirtker v. Baltimore Annual Conference of the United Methodist Church, 894 F.2d 1354, 1358 (D.C. Cir. 1990) (minister); Young v. Northern Illinois Conference of United Methodist Church, 21 F.3d 184 (7th Cir. 1994) (probationary minister); Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360 (8th Cir. 1991) (church-affiliated hospital's chaplain). Conversely, lower level or purely secular employees are not precluded from bringing such

action. See, e.g., Heard, 810 A.2d at 880 ("Civil courts also may have jurisdiction over employment disputes where the employee provides a purely secular service for the church."); Diocese of Raleigh, 213 F.3d 795, 801 (4th Cir. 2000) ("For instance, the exception would not apply to employment decisions concerning purely custodial or administrative personnel."); EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272, 1278-82 (9th Cir. 1982) (editorial secretary of religious press not precluded from bringing suit).

While such calls may be relatively easy, courts have also dealt with cases in which the employee occupied a position much closer to the middle of the spectrum. Employees responsible for a religious institution's music, for instance, have been found to be covered under the ministerial exception. See Starkman. 198 F.3d 173 (lay choir director); Assemany v. Archdiocese of Detroit. 434N.W.2d 233, 238 (Mich. App. 1988) (church organist). Moving from the liturgical to the gastronomic, a district court this year held that a Mashgiach (kosher supervisor) of a religious home performed sacerdotal functions and was thus a ministerial employee. See Shaliehsabou v. Hebrew Home of Greater Washington. Inc., 247 F. Supp. 2d 728 (D. Md. 2003). Even more expansively, the Seventh Circuit, also this year, held that the Hispanic Communications Manager of the Archdiocese of Chicago served a ministerial function since she was "responsible for conveying the message of an organization to the public as a whole . . . [and] was the liaison between the Church and the community to whom it directed its message." Alicea-Hernandez, 320 F.3d at 704.
Cases concerning teachers at religious institutions have come down on both sides of the issue. Compare Guinan v. Roman Catholic Archdiocese of Indianapolis, 42 F. Supp. 2d 849 (S.D. Ind. 1998) (Catholic school teacher who taught mostly secular classes and did not lead in religious worship services, even though she did organize Mass once a month and taught at least one religion class per term, was not

ministerial employee); DeMarco v. Holy Cross High School, 4 F.3d 166 (2d Cir. 1993) (mathematics teacher at Catholic high school was not ministerial employee, even through he led his students in prayer and took them to Mass, yet court did not deal with Free Exercise defense) with EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (non-ordained faculty at Baptist seminary could not bring suit); Powell v. Stafford, 859 F. Supp. 1343 (D. Colo. 1994) (theology teacher at Catholic school falls under ministerial exception).

The only cases either mentioned by the parties or found by the Court that deal with employment suits brought by principals of religious schools are Sabatino v. Saint Aloysius Parish, 672 A.2d 217 (N.J. App. Div. 1996), Nigrelli v. Catholic Bishop of Chicago, 1991 U.S. Dist. LEXIS 3083 (N.D. Ill. 1991), and Black v. St. Bernadette Congregation, 360 N.W. 2d 550 (Wise. App. 1984). The latter two offer little assistance. In Nigrelli, the defendant did not even raise the ministerial exception, and the Court only briefly touched on the First Amendment issues involved in denying summary judgment for the defendant. In Black, the Court affirmed a grant of summary judgment, but the issue addressed was not the ministerial exception, but rather whether the principal was fired for an ecclesiastical reason. Sabatino, however, does provide some guidance. The plaintiff there sued when her position as the principal of a Catholic school was terminated as a result of a school reorganization. The appellate court affirmed the lower court's dismissal of her employment suit on Free Exercise grounds, holding:

> [T]he role of the principal at the new school was "ministerial" within the context of religious doctrine and polity. The principal is in charge of students' religious education; she supervises the teachers, plays a significant

> role in curriculum development, is liaison between the school and the religious community, and is the guiding force behind the school's spiritual mission. Her functions are more than merely financial and logistic. Thus, we agree with Judge Fuentes that the principal of a parochial school does perform a "ministerial" function.

Id. at 219 (internal citation and citation omitted).

3. *Principal of St. Francis Xavier*

It is against this legal landscape that the facts must now be evaluated to determine if Plaintiffs "primary duties consisted] of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship" and "whether [her] position is important to the spiritual and pastoral mission of the church." Rayburn, 772 F.2d at 1169. The inquiry, as Plaintiff agrees, "should focus on 'the function of the position' at issue." Opp. at 17; see also Diocese of Raleigh, 213 F.3d at 801 ("Our inquiry thus focuses on 'the function of the position' at issue and not on categorical notions of who is or is not a 'minister.'") (citation omitted).

Defendants argue without contradiction that the Catholic schools in the Archdiocese "serve the spiritual and pastoral mission of the Church." Mot. at 7. Since the principal is the leader of the school, it is illuminating to examine the mission of the Catholic schools in the Archdiocese, which is set forth in the exhibits Defendants append to their Motion. See Catholic Univ., 83 F.3d at 464 (citing importance of mission of ecclesiastical faculties of Catholic University and purposes of courses).

"The Mission of Catholic Schools in the Church of Washington" is a document that begins: "Catholic schools are rooted in the belief that Jesus, the only mediator between God and man, is alive today within the community of the faithful, the Church. This Church has but one mission: to proclaim the Good News that the Father has reconciled all men to Himself in Jesus." Mot., Tab I, Exh. 10. Similarly, the "Catholic Schools Office Mission Statement" begins: "Central to our belief, our leadership, and our service with and on behalf of the Catholic schools of the Washington Archdiocese is our conviction that . . . *the Catholic school is an integral part of the Church's mission to proclaim the Gospel, to build faith communities, to celebrate through worship, to serve others.*" Id., Exh. 6 (italics original); see also id., Exh. 9 ("Guiding Principles for the Schools in the Archdiocese of Washington") ("As Christian institutions committed to the teachings of the Catholic Church, Catholic schools prepare students to respond in faith to Jesus Christ and to understand His message . . . ."). Finally, the "Criteria For Religious Programs" begins: "In order to preserve the uniqueness of the Catholic schools, not only should the Catholic faith permeate all aspects of the life of the school but also each school must offer a program of religious education .. .." Id., Tab J at 1; see also id., Tab I, Exh. 12 ("Instructional Goals") (first goal states: "Students will master the essentials of Catholic doctrine and principles of morality, understand Catholic liturgy with the Mass as its center, be familiar with the Scriptures, and be able to outline the historical development of the Church.").

Given the pervasive religious mission of the Catholic schools in the Archdiocese, it is not surprising to find that the principal of each school has a significant religious and spiritual role in furthering that mission. For example, the "Major Areas of Responsibility" for the principal begins with "spiritual leadership." Id., Tab I, Exh. 5. Likewise, the performance evaluation lists as the first category: "Provides

spiritual leadership in and for the school community." Id., Exh. 3. Indeed, the contract that Plaintiff signed obligated her to "aid in the Christian formation [o]f students," id., Exh. 1, ¶ A; Plaintiff therein also "recognize[d] that the . . . school is operated in accordance with the teachings and doctrines of the Roman Catholic Church as delineated and set forth by the Ordinary of Washington," id., ¶ C; and she also admitted having "seen and reviewed a copy of the Guiding Principals [*sic*], Goals and Objectives of the Archdiocese of Washington." Id., ¶ E.

Additionally, Plaintiff admitted "she was responsible for hiring teachers who could teach the Catholic courses . . . [and] made certain that students attended mass pursuant to Archdiocesan policy and guidelines." Mot., Tab M (Plaintiffs Answers to Interrogatories) at 2. She similarly conceded that "one of her many duties was to work with the pastor to ensure that the administrative aspects of the religious education program was being met and were in conformity with the policy and guidelines of the Archdiocese of Washington." Mot., Tab H (Responses to Requests for Admission) at 3.

4. Plaintiff's Arguments

In opposing this compelling evidence, Plaintiff argues that her job as principal was administrative rather than ministerial. Opp. at 17-23. Plaintiff cites in support the School Advisory Board to the Archdiocese of Washington, which defines the function of principal as follows: "The principal is responsible for the internal day-to-day operation of the school." Opp., Tab 9. Yet, this same paragraph says that "[t]he principal and the pastor comprise the administrative team of the school," id., and Plaintiff would not argue that the pastor is principally an administrator. Indeed, she argues the very opposite. See Opp. at 23-24.

Plaintiff also proffers affidavits from three people characterized as "former executives of the Defendants knowledgeable about the Archdiocese of Washington policies, the Catholic Church and the Catholic Church school system . . . [to] aver that the role of the Principal in a Catholic school is primarily administrative and clearly not ministerial." See Opp. at 21. Yet these affidavits do not overcome Defendants' evidence largely for two reasons. First, "ministerial" is a legal term that "does not depend upon ordination but upon the function of the position." Rayburn, 772 F.2d at 1168 (citation omitted). These affiants seem unaware of this point in their efforts to distinguish between "ministerial" and "administrative." Second, there is no doubt that a principal at an elementary school, Catholic or not, has a great many administrative responsibilities. That, however, is not the issue; instead, the question is what the principal's primary duties are and whether the "position is important to the spiritual and pastoral mission of the church." Id. at 1169.

In Montrose Christian School v. Walsh, 770 A.2d 111 (Md. 2001), the Maryland Court of Appeals held that an employment discrimination statute that exempted only school personnel who performed "purely religious functions" violated the Free Exercise Clause. In explaining why that was too restrictive, the Court stated:

> It is doubtful that any employees of religious organizations in Montgomery County perform purely religious functions. Even ministers, pastors, priests, rabbis, and other theological heads of religious organizations occasionally perform functions which would not ordinarily be characterized as "religious." Many other employees of religious organizations, such as teachers, may perform both religious and non-religious functions.

Id. at 128 (emphasis original).

As mentioned above, Plaintiff also argues that the Pastor, rather than she, is the "chief religious educator for the entire parish as well as for the parish school." Opp. at 23. Yet, as the Fourth Circuit held in rejecting this very argument made on behalf of the Director of Music Ministries: "[T]here is no requirement that an individual have 'final say' on spiritual matters before the ministerial exception can be applied." 213 F.3d at 803; see also Montrose Christian, 770 A.2d 111.

Plaintiff also devotes several pages of her Opposition to the argument that her firing was pretextual. See Opp. at 24-29. Yet, the ministerial exception "precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decisions. The church need not, for example, proffer any religious justification for its decision, for the Free Exercise Clause 'protects the act of a decision rather than a motivation behind it.'" Diocese of Raleigh, 213 F.3d at 801 (quoting Ravburn, 772 F.2d at 1169); accord Catholic University, 83 F.3d at 465. Plaintiff's argument, therefore, is irrelevant where the Court finds the ministerial exception to apply.

In sum, the principal, along with the pastor, is the person who leads the school, the person who communicates the school's message to the faculty, staff, students, and parents. Given the role the schools play in the Archdiocese and the role the principal plays at the school, it is clear that Plaintiffs "position is important to the spiritual and pastoral mission of the church," id. at 1169, and that her "primary duties consist of teaching [and] spreading the faith." Id. at 1168; see also Diocese of Raleigh, 213 F.3d at 804 ("Austin was the primary human vessel through whom the church chose to spread its message in song. Employment decisions concerning her music ministry thus relate to how and by

whom churches spread their message. These decisions lie accordingly beyond judicial competence.")(internal citation and quotation and citation omitted); Alicea-Hernandez, 320 F.3d at 704 (plaintiff was "responsible for conveying the message of an organization to the public as a whole. A press secretary . . . is often the primary communications link to the general populace. The role of press secretary is critical in message dissemination, and a church's message, of course, is of singular importance.").

Indeed, the selection of Plaintiff to be principal of the school "places the imprimatur of the church upon that person as a worthy spiritual leader." Rayburn, 772 F.2d at 1168. Given Plaintiffs role, the Court finds that she fits within the ministerial exception, thus depriving the Court of subject matter jurisdiction to consider Counts I and II.

B. Contract Claims

Plaintiff has also brought common law claims for breach of contract and breach of the implied covenant of good faith and fair dealing.[2] The contract claims assert that Defendants failed to pay Plaintiff her last two paychecks. Although the Court encouraged the parties to perform some basic accounting work to resolve the merits of this claim, the parties remain in disagreement over whether these last two payments remain outstanding. As this constitutes a disputed fact, it is not ripe for disposition on summary judgment.

Although Defendants maintain in passing and without case support that they are also shielded from these contract claims on First Amendment grounds, such an argument does not prevail at this stage. First, Defendants have not disputed that they owed Plaintiff her full salary;

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2 Her defamation count (Count V) has been withdrawn. gee Opp. at 8 n.2.

instead, they argue it has already been paid, which cannot now be determined as a matter of law. Second, it is questionable whether a religious institution can invoke the Free Exercise Clause in relation to a contract term such as this. See United Methodist Church, 571 A.2d at 795 ("Federal circuit courts of appeal have held that the church is not above the law and may be held liable for valid contracts.") (citations omitted); Rayburn, 772 F.2d at 1171 ("Of course, churches are not – and should not be – above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts."). In other words, where the disputed term does not refer to the employee's actual employment and "involve[s] no more than simply the secular questions of whether such promises were made by [the institution] and, if so, whether the benefits were properly denied to [the employee]," the Free Exercise Clause may well not preclude scrutiny. United Methodist Church, 571 A.2d at 796. Particularly where Defendants have not briefed this issue, the Court believes an award of summary judgment would be premature.

The Court, accordingly, ORDERS that:

1. Defendants' Motion is GRANTED IN PART and DENIED IN PART; and

2. Counts I, II, and V are DISMISSED.

IT IS SO ORDERED.

July 29, 2003
Date

James E. Boasberg
Judge

Copies mailed to:

R. Scott Oswald, Esquire
1850 M St., NW, Suite 920
Washington, DC 20036-5820
Emmet Flood, Esquire
Lisa Duggan, Esquire
725 - 12th St., NW
Washington, DC 20005

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No. 05-311

IN THE

Supreme Court of the United States

KATHLEEN PARDUE,
Petitioner,

v.

THE CENTER CITY CONSORTIUM SCHOOLS OF THE ARCHDIOCESE OF WASHINGTON, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

EMMET T. FLOOD *
LISA M. DUGGAN

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

* Counsel of Record

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the "ministerial exception" to the anti-discrimination laws—which permits religious employers to make decisions concerning employees holding positions of religious significance to the employer free of judicial review—is consistent with this Court's holding in *Employment Division v. Smith*, 494 U.S. 872 (1990).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents state that the Roman Catholic Archbishop of Washington (hereinafter referred to as the "Archdiocese of Washington") is a Corporation Sole with no parent corporation. The Center City Consortium Schools of the Archdiocese of Washington, Inc. is incorporated pursuant to the District of Columbia Non-Profit Corporations Act and has no parent corporation. Neither the Archdiocese of Washington nor the Center City Consortium, Inc. is publicly held or affiliated with any entity that is so held.

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On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Kathleen Pardue was the principal of St. Francis Xavier School in the District of Columbia, a Roman Catholic primary school operated by Respondent, the Archdiocese of Washington (hereinafter the "Archdiocese"), from 1996 until January 2002. Petitioner was asked to resign, and did resign, in January 2002.[1] Approximately five months later, Petitioner filed claims in the Superior Court for the District of Columbia, challenging the Archdiocese's decision to seek her

[1] Respondents are the Archdiocese, the Center City Consortium Schools of the Archdiocese of Washington, Inc. (the "Consortium") and Mary Anne Stanton, the Consortium's Executive Director. For ease of reference, the Brief in Opposition will refer to the Respondents collectively as the "Archdiocese."

resignation and alleging that she was a victim of reverse race discrimination and retaliation in violation of provisions of the District of Columbia Human Rights Act (DCHRA).

Respondent Archdiocese moved to dismiss those claims on the ground that the Free Exercise and Establishment Clauses of the First Amendment deprived the Superior Court of subject matter jurisdiction because the principal position fit within a constitutional "ministerial exception" to otherwise applicable employment laws. That ministerial exception, the Archdiocese argued, protected its decision to seek Petitioner's resignation from any state interference or judicial review. P.C.A. 26a.[2] Relying upon a test articulated by the Fourth Circuit Court of Appeals in *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), the motion argued that under the First Amendment, the principal position in a Catholic elementary school was of such importance to the spiritual and pastoral mission of the Church as to justify the Church's making decisions relating to that position without having to defend such decisions in the judicial forum.

Recognizing the competing interests presented by the motion—*i.e.*, the court's need to further clarify the nature of the principal position while making only minimal intrusions into the First Amendment rights of the Archdiocese—the Superior Court ordered written discovery on the "limited topic of the role and position of the principal of St. Francis Xavier School." P.C.A. 26a. After discovery on that limited issue, the Archdiocese moved for summary judgment, arguing that undisputed facts established that the principal position was important to the spiritual and pastoral mission of the Church, and was therefore subject to First Amendment protections of such gravity that they overcame even the

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[2] "P.C.A." refers to the Appendix to the Petition for Certiorari ("Pet. Cert.") which includes the lower court opinions.

very substantial anti-discrimination policies reflected in the DCHRA. On July 29, 2003, the Superior Court granted summary judgment to the Archdiocese on Petitioner's discrimination claims (Counts I and II) on the basis that the Free Exercise Clause of the First Amendment deprived the Superior Court of subject matter jurisdiction. P.C.A. 25a. After additional briefing, the Superior Court granted summary judgment to the Archdiocese on Petitioner's remaining contract and tort claims. P.C.A. 23a.

Petitioner appealed the dismissal of her claims to the D.C. Court of Appeals. In a unanimous decision, that court declared that the ministerial exception was available to a religious employer as a potential defense to a DCHRA claim and then affirmed the Superior Court's ruling. P.C.A. 1a.

REASONS FOR DENYING THE WRIT

I. REVIEW SHOULD BE DENIED BECAUSE THE ONE FEDERAL ISSUE PRESENTED BY PETITIONER—WHETHER APPLICATION OF A FIRST AMENDMENT "MINISTERIAL EXCEPTION" TO ANTI-DISCRIMINATION LAWS PRESENTS A CONFLICT WITH THIS COURT'S DECISION IN *EMPLOYMENT DIVISION V. SMITH*—HAS NOT BEEN PRESERVED.

Petitioner correctly identifies a genuine federal issue: whether a constitutional "ministerial exception" to the employment laws permitting a religious entity to make certain employment decisions free of judicial review is in conflict with *Employment Division v. Smith*, 494 U.S. 872 (1990), which rejected the claims of two individuals to a Free Exercise Clause right to be exempt from a neutral, generally applicable criminal law. *See* Pet. Cert. at 12. However, that

issue has not been preserved for review in this Court. As the D.C. Court of Appeals opinion clearly stated:

> *Pardue makes no argument that the validity of the ministerial exception has been called into question by the Supreme Court's decision in Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) . . . . Although we have no occasion to treat the issue, we note that "[a]ll circuits to have addressed the question have recognized the continuing vitality of the [ministerial] exception after the [*Smith*] decision." *[EEOC v.] Roman Catholic Diocese*, 213 F.3d [795 at] 800 n.* [(4th Cir. 2000)].

P.C.A. 8a n.4 (emphasis added).

Petitioner herself tacitly acknowledges that she did not present this issue to the Court below. *See* Pet. Cert. at 15, n.5 ("The court of appeals observed that Petitioner did not raise the issue of the legal validity of the ministerial exception in light of the *Smith* decision as an objection at the superior court level. . . . This is because Petitioner argued at both the trial court level and on appeal that she did not fall within the ambit of [the] ministerial exception . . . and that therefore the ministerial exception was not applicable to her."). Because Petitioner did not present the question below, the D.C. Court of Appeals (although noting the issue) did not discuss it. For that reason, no conflict between the decision below and *Smith* is discernible in the opinion of the D.C. Court of Appeals. And for the same reason, the record below is particularly unsuitable for consideration of the issue in this matter.

Petitioner's failure to argue at any time before submission of this petition that the ministerial exception is *per se* objectionable under existing law (as contrasted with its allegedly erroneous application to her facts) is fatal to her request for certiorari review. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 585 (2004) ("We ordinarily do not decide in the first instance issues not decided below.") (quoting

Adarand Constr., Inc. v. Mineta, 534 U.S. 103, 109 (2001)); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."); *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937) ("We do not discuss petitioner's contentions which he failed to assign as error below.").

II. EVEN IF PETITIONER HAD PRESERVED THE *SMITH* ISSUE, THIS COURT'S REVIEW WOULD BE UNWARRANTED.

The petition should be denied for the additional reason that there is no division of authority among lower courts on the question whether the ministerial exception continues to apply in the aftermath of this Court's decision in *Smith*. As the D.C. Court of Appeals pointed out in this very matter, every court of appeals to consider the question has determined that this Court's *Smith* decision did not abrogate the protection afforded religious institutions by the ministerial exception. *See* P.C.A. 8a. n.4 (citing *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 800 n* (4th Cir. 2000)); *see also Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *Combs v. Cent. Tex. Annual Conf. of the United Methodist Church*, 173 F.3d 343, 347-50 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996). *Accord Bryce v. Episcopal Church in the Diocese of Co.*, 289 F.3d 648, 656 (10th Cir. 2002) (applying rationale of foregoing cases and finding that "church autonomy doctrine" similarly remains viable after *Smith*).

Furthermore, since *Smith* was decided, other Courts of Appeals and state courts of final authority have affirmed the existence of the constitutional ministerial exception without any discussion whatsoever of *Smith's* implications for the ministerial exception. *See, e.g., Werft v. Desert Sw. Annual*

Conf. of United Methodist Church, 377 F.3d 1099, 1101-02 (9th Cir. 2004); *Starkman v. Evans*, 198 F.3d 173, 175 (5th Cir. 1999); *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360, 363 (8th Cir. 1991); *Montrose Christian Sch. Corp. v. Walsh*, 770 A.2d 111, 126-28 (Md. 2001); *McKelvey v. Pierce*, 800 A.2d 840, 856-58 (N.J. 2002).

In short, even had the issue been properly preserved, there would be no need for this Court's intervention at this time.

III. PETITIONER'S CONTENTION THAT THE D.C. COURT OF APPEALS DECISION VIOLATED THE DISTRICT OF COLUMBIA HUMAN RIGHTS ACT PRESENTS NO FEDERAL QUESTION.

Petitioner also argues that a writ of certiorari should issue because the D.C. Court of Appeals decision was "contrary to the DCHRA"—evidently on the theory that the decision below improperly expanded the DCHRA's *statutory* ministerial exception, D.C. Code Ann. § 2-1401.03(b), to "an absurd degree." Pet. Cert. 18. That contention is not cognizable on certiorari review by this Court. Although the ministerial exception argued by Respondents below is a federal constitutional doctrine, the question whether the D.C. Court of Appeals decision was "contrary to the DCHRA" creates, at best, a state law question concerning which the D.C. Court of Appeals is the final authority. Thus, this Court has no jurisdiction to consider that question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EMMET T. FLOOD *
LISA M. DUGGAN

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000

* Counsel of Record

Attorneys for Respondents